Supreme Court, U. S.
FILED
JUN 11 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1946

JAMES MORAN,

Petitioner,

vs.

GOULD CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID KAIRYS
KAIRYS, RUDOVSKY & MAGUIGAN
Attorneys for Petitioner
1425 Walnut Street
Philadelphia, Pennsylvania 19102
(215) 563-8312

3549 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

	page
Table of Authorities	i
Opinion of the Court Below	1
Jurisdiction	1
Question Presented	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
Reasons for Granting the Petition	8
Conclusion	12

TABLE OF AUTHORITIES

Amyx Industries, Inc. v. NLRB, 457 F.2d 904 (8th Cir. 1972)	9
Central Hardware Co. v. NLRB, 407 U.S. 539 (1972)	9
Nash v. Florida Industrial Corp., 389 U.S. 235 (1967)	11
NLRB v. Craw, 565 F.2d 1267 (3d Cir. 1977)	9
NLRB v. Jack LeLanne Management Corp., 539 F.2d 292 (2d Cir. 1976)	9-10
NLRB v. Lou DeYoung's Market Basket, Inc., 406 F.2d 17, (6th Cir. 1969)	10

Table of Authorities, cont.

	page
NLRB v. Scrivener, 405 U.S. 117 (1972)	11
PSC Resources, Inc. v. NLRB, 576 F.2d 380 (1st Cir. 1978)	9
U.S. Soil Conditioning v. NLRB, 606 F.2d 940 (10th Cir. 1979)	9
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	9

APPENDIX

Appendix A - Opinion for United States Court of Appeals For The Third Circuit	1a
Appendix B - Order for United States Court of Appeals For The Third Circuit	14a
Appendix C - Judgment United States Court of Appeals For The Third Circuit	16a
Appendix C - Petition for Rehearing En Banc	17a
Appendix D - Letter of ITE Imperial Corporation Dated February 18, 1976	18a

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MORAN,

Petitioner,

v.

GOULD CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, James Moran, by his counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 25, 1980.

Opinion of the Court Below

Copies of the Court of Appeals' Opinion and subsequent Amendment to the Opinion are appended hereto as Appendices A and B, respectively.

Jurisdiction

The Judgment of the Court of Appeals was entered on February 25, 1980. A Petition for Rehearing En Banc was denied on March 14, 1980. Copies of each of the above are attached in Appendix C. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Was the substantial evidence standard of review of NLRB factual determinations erroneously modified or grossly misapplied by the court of appeals?

Constitutional and Statutory Provisions

United States Code, Title 29, §158(a)(4).

> "It shall be an unfair labor practice for an employer --
>
> * * *
>
> to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."

Statement of the Case

On October 13, 1976, there was a spontaneous interruption of work at the Gould Corporation plant in Philadelphia prompted by the company's late response to a union grievance (later won by the union) about use of non-bargaining unit employees. According to the testimony of the company's foreman on the shop floor, this interruption consisted of spontaneous complaints by employees for about two hours, during which 20% to 40% of the employees did not work while company and union officials attempted to resolve the problem. App. 320a-21a. There was no production loss (App. 92a-97a),[1/] things returned to nor-

---

1. The appropriate company official was asked to state in concrete terms what, if
(footnote cont. next page)

mal after the company made a commitment concerning bargaining unit workers.

One employee, Petitioner, was disciplined. Although Petitioner arrived after the disturbance started and, as the union steward, expressed the views of the members and attempted to resolve the matter,[2/] he was fired, allegedly for participating in a work stoppage.

Plaintiff filed a complaint with the National Labor Relations Board [hereinafter "NLRB" or "Board"] claiming he was fired for his union status and activity and because he had filed complaints to the Board,

---

(footnote cont. from preceding page)
any, loss the company incurred, but neither that official nor any other witness provided any evidence of a concrete loss. The timekeeper testified that production "was not much different than any other night." App. 138a. The employees, who were paid on a bonus system, apparently made up for the minor loss of work time.

2. On the other hand, as the discontent was brewing, the company's foreman on the floor hid in his office, hoping the dispute would just go away instead of discussing it with the employees and Petitioner. He testified, "I guess I didn't have the nerve at that point." App. 325a.

the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration. An Administrative Law Judge of the Board ordered Petitioner reinstated with full back pay, finding his discharge in violation of §§8(a)(1),(3) and (4) of the National Labor Relations Act [hereinafter "the Act"]. On August 25, 1978, the Board affirmed the violation of §8(a)(3) by a vote of 3 to 2 and the violation of §8(a)(4) by a vote of 4 to 1.

The Board's findings were based on quite unusual evidence: the company put in writing both its animus against Petitioner based on his protected activity and the direct relationship of that animus to his discharge. Specifically, the Board's findings were based on the following:

1. A letter dated February 18, 1976 from the company to the union showing company animus against Moran based on his role as a steward and his filing of complaints with federal agencies. App. 409a-11a. This letter lists five actions by Moran that are termed "entirely inappropriate"; three of the five actions specified were:[3/]

(footnote on following page)

"3. In June 1975, Mr. Moran notified the Occupational Health and Safety Administration officers of an alleged health violation. . . .

"4. In August 1975, Mr. Moran filed a charge with the National Labor Relations Board that he was laid off improperly. . . .

"5. In May 1975, Mr. Moran filed a charge with the E.E.O.C. on behalf of an employee whom he represented alleging sex discrimination. . . ." App. 410a.

A copy of this letter is attached hereto in Appendix D.

2. The company's minutes of the fourth step grievance procedure meeting indicating that the February 18, 1976 letter was used by the company to justify the discharge of Moran. App. 412a-13a. Those minutes state:

"After thorough review and discussion, the Company advised the Union that in light of Mr. Moran's actions and statements on the evening of October 13, 1976, which were contrary to the obligations of a Shop

---

3. The other two concerned an alleged work stoppage in 1973, about which the company had not brought any disciplinary charges, and an alleged use of company time to prepare grievances.

> Steward and, in view of his past actions as an employee and Shop Steward which indicate repeated violations of the Collective Bargaining Agreement, other agreements, and Company Policy, the Company feels that the discharge in this case was entirely justified. (The Company also outlined Mr. Moran's past violations of the Agreement as a Shop Steward which were discussed in a letter to the Union dated February 18, 1976, copy attached, as well as Mr. Moran's record as an employee.) Therefore, the Company sustains its position and the discharge will stand." App. 413a.

A copy of these minutes is attached hereto in Appendix D. The union's minutes of this meeting agree. App. 417a-20a, 113a, 163a.

3. An internal progress report of the company indicating that Petitioner was alone selected for discipline from among the many employees allegedly involved because of his "past actions as an employee and a shop steward" (App. 416a), which the Board interpreted to refer to his complaints to federal agencies.

4. Petitioner was the only employee disciplined at all, and the company discharged him rather than seeking a lesser punishment even though the interruption of

work started before he arrived and was, at most, minor and short-lived.

The court of appeals overturned the Board's order, largely focussing on the §8(a)(3) claim.[4/] In a paragraph at the end of the opinion (Appendix A, at 12), the court dismissed the Board's ruling on the §8(a)(4) violation by essentially rejecting the Board's partial or mixed motivation standard.

Petitioner sought a rehearing en banc on the panel's rejection of the partial motivation standard, and the panel then amended its opinion, changing the legal standard and reaffirming the Third Circuit's earlier cases on partial motivation. Appendix B, at 1-2. However, the court did not modify its result -- the Board's findings and Petitioner's claim were rejected, without explanation, by simply saying "we conclude that there is no sub-

---

4. The Board had held 3-2, that singling out the steward was a per se violation of §8(a)(3). This new rule was the subject of amicus briefs and the main or sole focus of all involved, except Petitioner.

stantial evidence" supporting a finding under the partial motivation standard.[5] Id. at 2.

Reasons for Granting the Petition

The unexplained determination of the court of appeals that there is no substantial evidence is wholly unfounded. In this case, the employer has taken the unusual step of putting both his impermissible motive and its direct relationship to the discharge in writing.[6] The Board, by a vote of 4-1, made a partial motivation finding -- based on these documents,

---

5. Petitioner filed a motion for leave to file a new petition for rehearing en banc concerning the new issue in the amended opinion -- whether there was substantial evidence of partial motivation. This was denied by the panel, and a petition for rehearing en banc on the denial of this motion was also filed and denied.

6. The only discussion of the February, 1976 letter in the opinion directly contradicts the explicit language of the letter. Early in the opinion, the court stated that the company in the letter "conceded that [Petitioner] had acted within his rights" in filing complaints with federal agencies. Appendix A, at 5. To the contrary, the company said an employee could file such complaints but not a
(footnote cont. following page)

reasonable interpretations and inferences, and a detailed review of the record as a whole -- that is clearly supported by substantial evidence as this Court and every other circuit court have defined and applied that standard in prior decisions. Pursuant to that standard, a court of appeals must not substitute its view for that of the Board when there are two reasonable conflicting views. E.g., Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Craw, 565 F.2d 1267, 1270 (3d Cir. 1977); U.S. Soil Conditioning v. NLRB, 606 F.2d 940 (10th Cir. 1979); Amyx Industries, Inc. v. NLRB, 457 F.2d 904 (8th Cir. 1972). Special deference to the Board is appropriate where improper employer motive is the issue. PSC Resources, Inc. v. NLRB, 576 F.2d 380, 382-85 (1st Cir. 1978); NLRB v. Jack LeLanne Manage-

---

(footnote cont. from preceding page)
steward:

> ". . . the Company's objection to these actions is based on the fact that Mr. Moran is a shop steward . . . His rights to take such individual actions, as anemployee, are not in question." Appendix D, at 2-3 (emphasis added).

ment Corp., 539 F.2d 292, 294 (2d Cir. 1976); NLRB v. Lou DeYoung's Market Basket, Inc., 406 F.2d 17, 22-23 (6th Cir. 1969).

The court of appeals has de facto modified and grossly misapplied the substantial evidence standard of review. The amended opinion does not explicitly state that a court of appeals can, for whatever reasons, simply substitute its view of the facts without explanation. But a comparison of the opinion with the Board's decision, which future litigants are likely to make, surely leads to the conclusion that the Third Circuit has modified the substantial evidence standard -- and that one can rely on the Board's detemination, and therefore on the Board as a mechanism of peaceful and fair resolution of labor disputes, only at considerable risk.

This erosion of the substantial evidence standard of review is particularly significant in the context of a §8(a)(4) violation. The Board has no jurisdiction to initiate action without a complaint, and therefore the intergrity and functioning of the Board and the statutory scheme depend on complainants coming forward and

being protected against retaliation. In Nash v. Florida Industrial Corp., 389 U.S. 235, 238 (1967), this Court said:

> "Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board."

See also NLRB v. Scrivener, 405 U.S. 117 (1972).

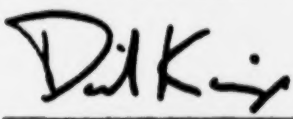
The conclusion of the court of appeals is appropriate only if it rejects the partial motivation rule, as it did in the original opinion. The opinion has been amended in this regard, but the court's reaffirmation of its result by simply saying "no substantial evidence" is unsupported and unsupportable. Indeed, particular substantive rules are of no particular significance -- and the Act and the Board offer no real protection to employees -- if, after years of successful litigation before the Board's administrative law judge and the Board itself, a clearly supported determination can be so

inexplicably overturned. The decision creates a bad precedent, is unfair to the particular litigant, and serves to undermine the social usefulness of our scheme of labor laws and the strong public policy of keeping labor disputes within established mechanisms by contradicting the fairness and viability of those mechanisms.

Conclusion

For the foregoing resaons, Petitioner prays that this Court issue a Writ of Certiorari.

Respectfully submitted,



David Kairys
Kairys, Rudovsky &
Maguigan
1425 Walnut Street, #300
Philadelphia, Pa. 19102
(215)563-8312

Appendix A - Opinion for United States Court of Appeals For The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2220

GOULD INCORPORATED, *Petitioner*

v.

THE NATIONAL LABOR RELATIONS BOARD, *Respondent*

JAMES MORAN, *Intervenor*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS APPLICATION FOR ENFORCEMENT OF THAT ORDER

(Case No. 4-CA-8519)

Argued August 8, 1979

Before: ALDISERT and WEIS, *Circuit Judges*, and DIAMOND, *District Judge**

(Filed December 27, 1979)

John Markle, Jr.
Mark M. Wilcox
DRINKER, BIDDLE & REATH
1100 PNB Building
Philadelphia, PA 19107
ATTORNEYS FOR PETITIONER

---

*Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix A

Marjorie S. Gofreed
Allan Banov
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570
ATTORNEYS FOR RESPONDENT

David Kairys
KAIRYS, RUDOVSKY & MAGUIGAN
1425 Walnut Street
Philadelphia, PA 19102
ATTORNEYS FOR INTERVENOR

OPINION OF THE COURT

DIAMOND, J.:

Gould, Inc. (Gould) has petitioned for review of an order of the National Labor Relations Board (Board) in which it held that Gould committed unfair labor practices in violation of §§8(a)(1), (3), (4) of the National Labor Relations Act (Act), 29 U.S.C. §§158(a)(1), (3), (4),[1]

1. The pertinent parts of those Sections of the Act provide:

§8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [this Act] . . . .

(Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for . . . other mutual aid or protection . . . .")

when Gould discharged an employee for disciplinary reasons. The Board has filed a cross petition for the enforcement of that order. We have jurisdiction under §§10(e), (f) of the Act, 29 U.S.C. §§160(e), (f).

The principal question which we must decide is whether it was an unfair labor practice for the employer to single out for disciplinary discharge a union steward who participated with a number of rank-and-file union members in an illegal work stoppage where the steward failed to discharge his contractual obligation as a union officer to take steps to terminate that work stoppage. The Board held that it was. We disagree and, for the reasons set forth below, grant the petition for review and deny enforcement of the Board's order.

The relevant facts found by the administrative law judge (ALJ), affirmed by the Board, and which appear to be supported by substantial evidence, may be summarized as follows. On October 13, 1976, a number of members of Local 12, United Automobile Aero Space and Agricultural Implement Workers of America (Union) engaged in an illegal work stoppage at Gould's plant in Philadelphia, Pennsylvania. Among those participating in the strike was shop steward James P. Moran.[2] At the time of the work stoppage Gould and the Union were signatories to a collective bargaining agreement, Article XVI of which dealt with strikes and lockouts. Section 1 of that Article contained a no-strike clause, §2 provided that violators of the no-strike clause were subject to disciplinary action including discharge, and §3 required union officials to take positive steps to terminate illegal work stoppages.[3]

---

2. Gould disputes the Board's finding that Moran was a mere participant in the strike and argues that he not only participated but also instigated and led it. In our opinion, however, that distinction is immaterial.

3. The complete text of those sections follows:

Section 1. For the duration of this Agreement, and except for the failure of the Company or the Union to comply with the arbitration provisions of the Agreement, the Union agrees that

Appendix A

Following an investigation into the strike, Gould singled out Moran for discharge from among the group of approximately fifty illegal strikers, and the Union responded by filing a grievance. At a fourth step grievance meeting the company stated that it had singled out Moran for discipline because he failed to carry out his Article XVI §3 duty as steward to attempt to restore order and terminate the work stoppage and also because he had participated in a similar strike some three years earlier. To substantiate the latter claim, Gould cited ex-

---

NOTE 3 — *(Continued)*

it shall not call, sanction, or engage in any strike, slowdown or stoppage of work; and the Company agrees that it shall not cause or engage in any lockout.

Section 2. Any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement may be disciplined or discharged by the Company. It is recognized that any such action by the Company shall be subject to the Grievance Procedure.

Section 3. In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:

Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line.

The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.

The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

cerpts from a February, 1976, letter which it had sent to the Union's president complaining, inter alia, of Moran's participation in a 1973 illegal strike. In that letter Gould had also complained of certain other activities of Moran; specifically, his filing of charges against Gould with the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and the Board itself. With regard to these acts, however, the letter stated that while the company believed that Moran should have first used or exhausted the parties' agreed-upon procedures for resolving disputes, it nevertheless conceded that he had acted within his rights.

The grievance subsequently was withdrawn and unfair labor charges were filed against petitioner with the Board whose General Counsel then filed a complaint against Gould. The complaint charged that in addition to Gould's above-stated bases for selecting Moran for discharge, it was also motivated by his having filed the various charges with EEOC, OSHA, and the Board and was thus in violation of §8 (a)(4) of the Act, which prohibits retaliation against those who file charges alleging labor law violations. The complaint further alleged that one of the company's admitted grounds for discharging Moran — his failure to attempt to restore order and terminate the work stoppage — was in and of itself violative of the provisions of §§8(a)(1) and (3) prohibiting, inter alia, interference with or discouragement of the exercise by employees of their right to organize or join unions.

As to the §§8(a)(1) and (3) charges the ALJ found that while as a steward Moran had a greater degree of responsibility than the other strikers under Article XVI §3, discharging him because he ignored that responsibility was unlawfully discriminatory. In this ruling, the ALJ relied on the Board's decision in *Precision Castings Company*, 233 NLRB 183 (1977). In that case the Board held that selection for discipline of a steward from among a group of illegal strikers on the ground that he

failed to restore order constituted "discrimination directed against an employee on the basis of his or her holding union office [and] is contrary to the plain meaning of Section 8 (a)(3)." 233 NLRB 184.

The ALJ also concluded that the §8 (a) (4) charge had been substantiated, finding that Gould's decision to discharge Moran "was affected or motivated, in part, by the fact that Moran had filed charges with or complained to EEOC and OSHA, and also because he had filed a charge with the NLRB."

The Board affirmed the ALJ's findings and conclusions. As to the §8(a)(4) violation for retaliatory conduct, the Board merely stated that it agreed with the conclusion that the evidence indicated Moran's filing of charges without prior resort to internal union procedures contributed to his discharge. In affirming the §§8(a)(1) and (3) violation, however, the Board set forth its reasoning in detail:

> Arguing that an individual may be discharged for violating a contract provision while acting in his position as union steward begs the question. Here the steward acted in concert with approximately 50 other employees, but was singled out for discipline solely because he was the steward. He was discharged not because of his actions as an employee, but because of his lack of actions as a steward, a legally impermissible criterion for discipline under the Act, and one which is not validated by a contract clause that specifies the responsibilities of union officers while acting as union officers. The contract is binding between the employer and the union, but does not grant the employer the power to enforce it by discharging union officials. The employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office. Employer self-help against individual union officials for a union's breach of contract

> can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by Section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives for collective bargaining or adjusting grievances. 237 NLRB No. 124, 2-3.

We first consider the law applicable to the §§8(a)(1) and (3) violations and begin by noting our prior holding that "strikes carried out in violation of a no-strike provision in a collective bargaining agreement are not protected by the Act, and therefore the discharge of employees who engage in such strikes is not an unfair labor practice." *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 (3rd Cir. 1974). Also relevant are Board rulings that an employer need not fire all illegal strikers, but may "pick and choose" which participants will be discharged as long as the basis for so doing is not union related. *Precision Castings, supra; Chrysler Corp.*, 232 NLRB 466, 474 (1977); *McLean Trucking Co.*, 175 NLRB 440, 450-51 (1969). See also *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939). And we note, finally, the holding of the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), that if the discriminatory discipline complained of is so inherently destructive of employee rights there is no need to establish any specific anti-union motivation in order to sustain a §8(a)(3) violation.

While there may be some question as to the Board's earlier position on the issue,[4] in *Precision Castings* the

---

4. On several occasions prior to its decision in *Precision Castings*, the Board reviewed the discharge of union stewards following their participation in illegal strikes and found no unfair labor practice. See *Super Valu Xenia*, 228 NLRB 1254 (1977); *Chrysler Corp.*, supra; *J. P. Weaterhy Construction Co.*, 182 NLRB 690 (1970);

Board flatly held that the selective dismissal, in and of itself, of a shop steward who participated in and made no effort to terminate an illegal strike constituted discrimination based solely on the holding of union office and, thus, was violative of §§8(a)(1) and (3). However, when the Board followed *Precision Castings* with a similar ruling in *Ind. & Mich. Elec. Co.*, 237 NLRB No. 35 (1978), that ruling was reversed on appeal, *Ind. & Mich. Elec. Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979). The Board had ruled that the greater responsibility which accompanies the holding of union office was insufficient reason for imposing more severe discipline on officers than rank-and-file strikers. In reversing, the court reasoned:

> Employees have no right to participate in an illegal strike. Accordingly, if an employee right is threatened here, it must be one relating to union office. The Board has said and we recognize that union office 'embodies the essence of protected concerted activities.' See *General Motors Corp.*, 218 N.L.R.B.

NOTE 4 — *(Continued)*

Russell Packing Co., 133 NLRB 194 (1961); *University Overland Express, Inc.*, 129 NLRB 82 (1960); and *Stockham Pipe Fittings, Co.*, 84 NLRB 629 (1949). The General Counsel now seeks to distinguish those cases on the ground that they involved stewards who exercised a leadership role in the strike, whereas here Moran was a mere participant. From our review of the cases it does not appear that *Precision Castings* is as consistent with prior Board rulings as the General Counsel would maintain. First, we note that certainly in *Super Valu Xenia* and arguably in *Russell*, the steward did not exercise a leadership role. Second, even where leadership apparently existed, the Board gave little, if any, indication that this was a controlling factor; i.e. that in its absence a §8(a)(3) violation would not have been found. In fact, in *Stockham* and *Overland Express* the Board acknowledged that union officials have a greater responsibility to abide by a no-strike clause than do the rank-and-file, thus suggesting at least that mere participation in an illegal strike by a union officer might be a sufficient basis for his selective discipline.

472, 477 (1975), *enforced*, 535 F.2d 1246 (3rd Cir. 1976). Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding office would no doubt have an inherently adverse affect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.

In arguing that status as a union official may not be the sole criterion for differentiating among employees in meting out discipline, the Board somewhat misstates the issue. The more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file. 599 F.2d 230

. . . .

Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike (footnote omitted) did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights. 599 F.2d 232

We concur in that reasoning and believe that it applies as well to the instant case and supports our conclusion that the Board's finding of a §8(a)(1) and (3) violation must be vacated. More specifically, we cannot agree

with the Board's deduction that since Moran was a steward and was discharged it follows logically that he "was singled out for discipline *solely because* he was the steward." On the contrary, it is clear that he was disciplined because he participated in an illegal strike and failed to perform his contractual obligation to take positive steps to halt that work stoppage. True, this duty devolved upon him because he fell within the *class* of persons upon whom the collective bargaining agreement imposed that duty, to wit, officers of the union, but the agreement could just as well have imposed this duty on individuals by name regardless of their office, and the result would be the same. In other words, it was a breach of a duty *imposed* by his office and not his office *as such* which formed the basis for his discharge. Viewed in this light, Moran's discharge was permissible and did not constitute an unfair labor practice. Indeed, if we were to hold otherwise, the union officer who participated in an illegal work stoppage would be placed in a more advantageous position than the rank-and-file member, and this would be neither fair, logical nor just.

The General Counsel's argument that since the company lacked the right under the contract to discharge Moran for violating Article XVI §3 his discharge was unlawful is unpersuasive. It is true that §3 contains no provision for the discipline of those who violate it, however, §2 does give the company the right to discharge those who participate in illegal work stoppages. Section 3 of Article XVI was relied upon merely as a basis for singling out Moran from among the strikers subject to discharge. This was lawful.

Having concluded that Moran had a contractual duty to take positive steps to terminate the illegal work stoppage and that his breach of that duty served as a basis for invoking a right of discharge otherwise existing, we inquire whether such action was inherently prejudicial of important employee rights. Here, too, we concur

with the court's reasoning in *Ind. & Mich. Elec. Co.* that logically no prejudice to employee rights can result where the employee is merely deterred from engaging in illegal activity and from breaching a contractual obligation, neither of which he has a *right* to do. As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of "union" activity. *Cf. American Ship Building Company v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed. 2d 855 (1965).

Finally, we cannot accept the Board's holding that the employer's proper remedy in a case such as this is a suit against the union for money damages. *Assuming* that such a claim could be maintained against the union, we see no reason why the employer should be remitted to such a course of action where the collective bargaining contract plainly gives the employer recourse directly against an offending officer, the assertion of which the employer in its judgment may very well conclude would have a more immediate and prophylactic effect. For it is undoubtedly true in many illegal strike situations that the employer would prefer to obtain a prompt resumption of production than a money judgment after a prolonged strike and expensive and protracted litigation. And it is certainly fair to assume that usually it is the steward or some other union official close to the scene who has the power, authority and influence most effectively to quash an illegal strike during its infancy or to prolong it indefinitely. The threat of his disciplinary discharge, therefore, is a valuable option which the employer should not be prohibited from exercising where it has been contractually acquired.

We now consider the §8(a)(4) violation. As earlier noted, §8(a)(4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges. . . ." The Board affirmed the ALJ's ruling that Moran's discharge was "affected or motivated in part" because he had filed charges with EEOC, OSHA and the Board. However, this falls short of holding that Moran was discharged "because of" these protected activities. This court previously held that where an employee's discharge is prompted by concurrent reasons, some permissible and some not, in order to support a ruling of an unfair labor practice the Board must find that the permissible reason proffered by the employer is merely a pretext and that in fact the employee was disciplined because of anti-union sentiment. *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363 (3rd Cir. 1978) To put it another way, if it is found that the employee would have been disciplined for proper cause notwithstanding the employer's attitude toward the union, the discipline must be held to be non-discriminatory, because in that case the causal relationship between the anti-union bias and the discipline would be insufficient to support a conclusion that the discipline was administered "because of" the protected activity and that the proffered proper reason was a pretext, it being elementary logic that the discipline could not be "because of" anti-union bias if the discipline would have resulted notwithstanding the absence of such bias. And, therefore, as we held in effect in *Edgewood Nursing*, in a mixed-motivation case unless the Board finds that in the absence of the impermissible motive the discipline would not have occurred, there can be no holding of a §8(a)(4) unfair labor practice. There was no such finding in the instant case, and since from our review of the entire record we conclude that, indeed, there is no substantial evidence to support such a conclusion, the Board's holding of a §8(a)(4) violation also must be vacated.

The petition for review will be granted and the application for enforcement will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B - Order for United States Court of Appeals For The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2220

GOULD INCORPORATED,
Petitioner

v.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent

JAMES MORAN, *Intervenor*

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS APPLICATION FOR ENFORCEMENT

(No. 4-CA-8519)

Present: ALDISERT and WEIS, *Circuit Judges*, and DIAMOND, *District Judge*.*

ORDER

It is ORDERED that the slip opinion in the above, filed on December 27, 1979, is hereby amended as follows:

Page 12. Delete the last two sentences and substitute the following therefor:

> We reaffirm this court's previous statement of the proper precept to be applied where there is a mixed motivation attending employer's action: "Although there might exist a justifiable cause for discharge of an employee, there is a violation of the Act if the real motive for the discharge is found to be the employer's dislike of union activity or affiliation. . . . Such

* Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

real motive will be found where union activity by the employee is recognized as a substantial or motivating cause of his discharge." *N.L.R.B. v. Gentithes*, 463 F.2d 557, 560 (3d Cir. 1972) (per Chief Judge Seitz). It is also controlling case law of this court that where there is substantial evidence that the employee's discharge was motivated by the employee's protected activity, there is a violation of the Act notwithstanding the concurrent existence of an otherwise valid reason. *N.L.R.B. v. Princeton Inn Co.*, 424 F.2d 264, 265 (3d Cir. 1970). From our review of the entire record we conclude that there is no substantial evidence to support a finding that Moran's discharge was because he had filed charges with the EEOC, OSHA, and the Board. Accordingly the Board's holding of a §8(a)(4) violation must be vacated.

BY THE COURT,

RUGGERO J. ALDISERT
Circuit Judge

DATED: March 13, 1980

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix C - Judgment United States Court of Appeals
For The Third Circuit

RECEIVED
JAN 18 1980
U.S.C.A. 3RD. CIR.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

GOULD INCORPORATED,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
JAMES MORAN,
Intervenor

No. 78-2220

JUDGMENT

Before: Aldisert and Weis, Circuit Judges, and Diamond District Judge.*

THIS CAUSE came on to be heard upon a petition filed by Gould Corporation to review an order of the National Labor Relations Board, directed against said petitioner, its officers, agents, successors, and assigns on August 25, 1978, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on August 8, 1979, and has considered the briefs and transcripts of record filed in this cause. On December 27, 1979, the Court being fully advised in the premises, handed down its opinion denying enforcement of the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the cross-application for enforcement of said order of the National Labor Relations Board in said proceeding be, and it hereby is denied.

DATED: February 25, 1980

By the Court

Circuit Judge

* Honorable Gustave Diamond of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix C - Petition for Rehearing En Banc

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2220

GOULD CORPORATION, Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD, Respondent

JAMES MORAN, Intervenor

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges,* and DIAMOND, District Judge. **

The petition for rehearing filed by

Intervenor

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Aldisert

Judge

Dated: March 14, 1980

* Judge Rosenn did not participate in the consideration of this matter.

** Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

GC-3 Appendix D - Letter of ITE Imperial Corporation Dated February 18, 1976

ITE Imperial CORPORATION (5)

February 18, 1976

United Auto Workers
Local #1612
1836 Callowhill St.
Philadelphia, Pennsylvania

Attention: Mr. F. Redmiles, President

Dear Sir:

Over the past several years, there have been several instances where Union Representatives have acted in a manner contrary to that prescribed by the Collective Bargaining Agreement and/or Appendices, thereto. When such matters have occurred, we have advised you and requested correction in verbal discussions. Unfortunately, however, we must now formally advise you that the actions of one particular Union Representative in the LACB Division repeatedly violates the procedures established for resolving disputes.

On several occasions, we have specifically discussed the actions of Mr. James Moran, Shop Steward for "2" Shift employees in the M-3 Machine Shop. The Company has advised you on at least five occasions of instances when Mr. Moran's actions as a Shop Steward were entirely inappropriate, if not in absolute violation of the Collective Bargaining Agreement. To be specific, the following occasions have given rise to Company initiated dialogue on this Shop Steward's actions:

1. In August 1973, Mr. Moran's actions as a Shop Steward resulted in a work stoppage on the second shift in the LACB Division. Shortly, following that instance, Union Officers were contacted and the illegal actions were handled responsibly by those Officers. Subsequent to that action, Mr. Moran was verbally warned in a meeting in which the undersigned, yourself, Harold Strack - Manufacturing Manager and Mr. Moran were present, that his actions were in violation of the Collective Bargaining Agreement and that recurrence of those actions could result in discipline up to and including discharge.

2. On several occasions during 1974, Mr. Moran was verbally advised that his actions in utilizing Company paid grievance time to prepare and file First Step Grievances on "placement"

matters were inappropriate and in violation of the Agreement. On at least three occasions, Mr. Moran and Union Officers, including yourself, were advised verbally that such action was improper; however, the Company paid Mr. Moran for each such instance. Finally, in January 1975, after ignoring three previous warnings, Mr. Moran was refused payment for a fourth such action.

3. In June 1975, Mr. Moran notified the Occupational Safety and Health Administration Officers of an alleged health violation in "M" Building (absence of water closet doors) without availing himself of internal mechanisms available for resolving such a matter.

4. In August 1975, Mr. Moran filed a charge with the National Labor Relations Board that he was laid off improperly. This action was taken while a grievance was in process. The grievance was filed on Mr. Moran's behalf by the Union.

5. In May 1975, Mr. Moran filed a charge with the E.E.O.C. on behalf of an employee whom he represented alleging sex discrimination, again, without availing himself of the internal mechanisms available.

Before going further, it is important to note that, in the past, the parties have repeatedly agreed to attempt to resolve disputes internally before resorting to external means. To that end, the parties have established several mechanisms within the Collective Bargaining Agreement and Appendices, thereto, to provide for resolution of a wide variety of issues that could materialize. For the most part, both parties and their representatives have operated within the framework of the Agreements referred to above.

The instances noted in paragraphs one and two above were discussed as each occurred and considered to be resolved at this point in time, but have been referred to for background purposes. However, the matters referred to in paragraphs three, four, and five certainly represent a violation of the philosophy and intent of the parties and quite possibly an absolute violation of the Collective Bargaining Agreement. It is important to note that the Company's objection to these actions is based on the fact that Mr. Moran is a Shop Steward and, as such, is particularly bound to administer the Collective Bargaining Agreement and policies of the parties in a manner prescribed by the parties. His rights to take

continued...

ITE Imperial Corporation

such individual actions, as an employee, are not in question.

Again, unfortunately, the Company finds it necessary to formally advise you of these actions and request corrective action since, to date, verbal discussions have not resulted in diminishing this Shop Steward's propensity to engage in violations of the parties intent and/or the Collective Bargaining Agreement. It is incumbent upon the Union to take appropriate measures to preclude repetition of such actions on the part of its Officers and Representatives. Therefore, the Company requests your careful attention to this matter and immediate action.

Very truly yours,
ITE IMPERIAL CORPORATION

J. J. Panciera
Manager, Employee Relations
LACE Division

JJP/a
cc: F. J. Hannings, Chairman, Bargaining Committee
Management Nego. Committee
Joseph Ferrara, Area Director

bcc: H. Strack

Appendix D

ITE Imperial

November 8, 1976

United Auto Workers Union
Local 1612
1836-38 Callowhill Street
Philadelphia, Penna. 19130

Attention: Mr. P. Hannings, Chairman, Bargaining Committee

Dear Sir:

Present for the Company	Present for the Union
W. P. Bolger	P. Redmiles
W. D. Breder	P. Hannings
C. C. Server	J. Brennan
J. J. Panciera	J. Cleary
J. R. Slenn	J. Delaney
J. R. Macklin	A. Gentile
G. Nichol	A. Pierro
	M. Rodgers
	C. Monaghan

These are the minutes of the meeting which was held on October 25, 1976, between the U.A.W., Local #1612 and Management to discuss the grievances and other matters which are outlined below. The order of this resume follows the order of discussion at the meeting.

1. LACB 3434 - J. Moran - Discharge - (Item 59 Union Recap Letter 10/22/7

The details of this grievance can be seen in the grievance filed and the grievance answers issued in the preceding steps of the procedure. The Union argued that Mr. Moran (who was discharged for violation of Article XVI of the Collective Bargaining Agreement) should not have been discharged, since they contended that his activities on the night of October 13, 1976, were not in violation of the Agreement. The Union stated that the position was based on two factors: 1) A petition signed by the employees who stated that Mr. Moran did not direct them to stop work and that he had asked them to return to work. 2) The Union stated that Mr. Moran joined with several Union Representatives in asking the employees to return to work at approximately 5:45 p.m.

The Company advised the Union that its information indicated that Mr. Moran's activities that evening were in violation of Article XVI of the Collective Bargaining Agreement. The Company stated that it did

ITE Distribution & Controls

not accept the Unions contention that Mr. Moran did not cause the employees to stop work, and that he directed employees to return to work, since the employees only returned to work after Union Officials appeared at the scene. However, in the main, the Company advised the Union that Mr. Moran's statements and actions during the work stoppage which occurred were, in the Company's opinion, clearly in violation of Article XVI of the Collective Bargaining Agreement. The statements and actions which placed Mr. Moran, the Shop Steward for the affected area, in violation of Article XVI were attested to by supervision and were outlined to the Union during the grievance discussion.

After thorough review and discussion, the Company advised the Union that in light of Mr. Moran's actions and statements on the evening of October 13, 1976, which were contrary to the obligations of a Shop Steward and, in view of his past actions as an employee and Shop Steward which indicates repeated violations of the Collective Bargaining Agreement, other agreements, and Company Policy, the Company feels that the discharge in this case was entirely justified. (The Company also outlined Mr. Moran's past violations of the Agreement as a Shop Steward which were discussed in a letter to the Union dated February 18, 1976, copy attached, as well as Mr. Moran's record as an employee.) Therefore, the Company sustained its position and the discharge will stand.